UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMES RAY,

Plaintiff, Case No: 1:15-cv-10176-JSR

-against-

DONALD WATNICK, JULIE STARK and JOHN DOES 1-5

Defendants.
---x

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Ames Ray is the Plaintiff in a lawsuit pending in New York State Supreme Court, captioned *Ames Ray v. Christina Ray*, index number 604381/1998. The Defendants Donald Watnick, Julie Stark and John Does 1-20 [collectively "Defendants"] have been attorneys who represent Christina Ray in that matter.

In his Complaint, Plaintiff alleged that Defendants violated New York Judiciary Law § 487 ["NYJL § 487"] when they made or consented to a series of deceitful statements in the course of that underlying litigation with the intent to deceive the New York State Supreme Court and the New York State Supreme Court, Appellate Division.

Defendants moved to dismiss, claiming that the Plaintiff's allegations do not meet the burden of pleading a NYJL § 487 claim, and arguing that the complaint "is a perversion of the statute upon which it relies." Defendants' Memorandum of Law at page 14. Defendants conclude that if this matter proceeded to discovery "nothing would prohibit any litigant who disagrees with any statement by opposing counsel from filing a separate, collateral §487 action for the purpose of discouraging effective representation by the other side." *Id*.

Neither statement reflects the reality of the instant matter. This is not a matter of disagreement. As demonstrated *infra*, and as alleged in the underlying complaint, over the course of twenty months and three briefs before two separate courts, it is alleged the Defendants made eight deceitful statements. It is alleged they did so with the intent to deceive these courts. It is further alleged that the Plaintiff was damaged as a result because *inter alia* he had to pay his lawyer to correct these falsities.

This makes out a claim pursuant to NYJL § 487, and Defendants motion should be denied.

RELEVANT FACTS

The first six pages of Defendants' brief discusses the procedural history of the underlying litigation. Most of this background is of dubious utility to this Court in determining the veracity of the eight statements alleged in the complaint. Their factual recitation does however suffer from lack of detail on two points that are useful to understanding the claims.

First, where the Defendants discuss the motion for summary judgment in the underlying action, in a footnote they reference that the First Department reversed Justice Ramos's grant of summary judgment to Christina Ray. Its holding bears a more fulsome discussion.

The First Department "unanimously reversed" the trial court's grant of summary judgment. *Ray v. Ray*, 61 A.D.3d 442, 443 (1st Dept. 2009), attached to Defendant's motion as Exhibit E. The First Department's reversal specifically held "[w]hile issues of fact clearly exist with regard to the parties' intentions relating to all of these documents and the ledger, as well as to defendant's claim of duress, they are not raised on appeal and would not, in any event, entitle defendant to summary judgment." *Id*. at 444. The motion for summary judgment was denied and the complaint was reinstated.

Secondly, Defendants' brief states the First Department reversed the trial court's grant of spoliation sanctions "on the basis that Christina's objection to the adequacy of discovery was untimely, among other grounds."

Paramount to these "other grounds" was the First Department's finding that "there is other relevant documentary and testimonial evidence available to [defendant]." *Ray v. Ray*, 121 A.D.3d 620, 621 (1st Dept. 2014), attached to Defendants' motion as Exhibit V. Again, the First Department "unanimously reversed" the trial court's award of spoliation.

ARGUMENT

When reviewing a complaint on motion to dismiss, the court must construe it "liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Osby v. City of New York*, 2016 U.S. App. LEXIS 1761, *2 (2d Cir. 2016) *citing Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). "The complaint must plead 'enough facts to state a claim to relief that is plausible on its face,' and allow [the court] 'to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. at *3 *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

At the outset, it should be noted that Defendants address seven of the eight statements alleged to be deceitful, and argue they were not.[1] To establish this they attach 25 exhibits to their motion to dismiss, arguing that these are both publically filed documents and documents the Plaintiff had access to. Defendants' Memorandum of Law at pages 13-14.

However, by submission of such a large record, fundamentally the relief sought by Defendants is summary judgment—not dismissal. To the extent this Court entertains that application and converts the within motion, Plaintiff below relies on and cites to the record as submitted by Defendants, and includes exhibits as well.

I. The Alleged Deceitful Statements Were False

Defendants' motion contains a point-by-point discussion of each statement that was alleged to be deceitful, and argues how it was either true or in some way supported by the record. As set forth below, the statements were each demonstrably false.

[1] Defendants' motion does not challenge the falsity of the statement, "as this Court recognized, plaintiff also admits the existence of oppressive circumstances and that he knew Christina feared him."

A. Plaintiff did not admit to physically abusing his wife

On January 25, 2013, Defendants filed a brief in opposition to Plaintiff's motion to preclude Christina Ray's expert witness from testifying. Their brief stated: "Clearly Dr. Kirstein missed Plaintiff's admission in his deposition that he physically abused Christina and that she was fearful of him." Exhibit N to Defendants' Motion at p. 8-9; Complaint at ¶ 22.

Defendants argue this is a fair characterization of the record because: (1) it was a rejoinder to Plaintiff's claim that there was no evidence of physical abuse, and (2) the Defendants cited as evidentiary support for this the trial court's statement that "these allegations of oppressive circumstances are credible, given the Plaintiff's admission in his deposition that he physically abused her 'maybe to alleviate some fear she had about what I might do.'" Exhibit D to Defendants' Motion at page 3.

This statement is not a fair characterization of the record. The statement that the Plaintiff admitted to physically abusing his wife has no evidentiary support.

First, whether the claim was a rejoinder to Plaintiff's assertion or not does not alter its truth or falsity—the statement has support, or it does not.

Second, Defendants' brief states that the Plaintiff's expert missed "his admission in his deposition." Exhibit N to Defendants' Motion at p. 8-9. Not that the Plaintiff's expert missed the Court's statement that Plaintiff admitted this in his deposition.

Third, the trial court mischaracterized the testimony. In the Plaintiff's deposition on April 25, 2007, the following colloquy was had:

Q. Did you ever strike Christina?
A. This is a when did I stop beating my wife question. I'm sure I hit her at some point.
Q. Do you remember when?
A. It was 1975 maybe. I don't know. Maybe '72.
Q. Was that the only time, was it only one time you recall?
A. I don't really remember the date.

Q. Do you remember the circumstances?
A. We were talking about a fear that she had of – maybe her – I don't remember exactly. Some fear she had about being hit, so I said – so I hit her on the hand or arm or something.
Q. Did you do that jokingly?
A. Of course. And maybe to alleviate some fear she had of what I might do.
Q. Did she express to you why she had fears that you might strike her?
A. Not that I would, that somebody would. She must have. I just don't remember.
Q. Other than the time you just mentioned in which you slapped her on the hand, are there any other instances in which you struck Christina?
A. No.
Q. Did you ever kick her?
A. No.

Deposition of Ames Ray attached hereto as Exhibit A.

The Plaintiff does not admit to physically abusing Christina Ray in this sequence.

Fourth, the trial court's characterization of the Plaintiff's testimony is neither evidence, nor an admission by the Plaintiff. The First Department had "unanimously reversed" the trial court's decision. Specifically, the First Department rejected the trial court's finding of duress, which was supported by its statement that the Plaintiff admitted to physically abusing his wife, concluding "issues of fact clearly exist with regard … to defendant's claim of duress, they are not raised on appeal and would not, in any event, entitle defendant to summary judgment." *Ray v. Ray*, 61 A.D.3d 442, 444 (1st Dept. 2009). As such, the trial court's finding is a nullity.

Fundamentally, what goes unchallenged by the Defendants is that the record is devoid of any actual evidence adduced from any source that the Plaintiff admitted to physically abused his Christina Ray. Complaint at ¶¶ 23-26.

What further goes unchallenged by the Defendants is that the statement "as this Court recognized, plaintiff also admits the existence of oppressive circumstances and that he knew Christina feared him" has no basis in the record. Complaint at ¶ 29. *See* Exhibit D to Defendants' Motion.

In sum, Defendants' reliance on one offhand statement by the trial court in a decision that was unanimously reversed is no basis to allege that the Plaintiff admitted to physically abusing his wife Christina Ray, or that he admitted their relationship persisted under oppressive circumstances and that she feared him. These statements are demonstrably false.

B. Plaintiff produced documents related to Confession of Judgment

On December 5, 2012, Defendants moved for spoliation sanctions against the Plaintiff. In support of this, Defendants stated:

> "Ames produced only one letter that preceded the date of the Confession – the unsigned Feb. 17, 1993 letter about the Confession and that stated it was from Christina to Alkalay. Conspicuously absent from Ames' and Alkalay's document production are any drafts of the Confession, written communications about the Confession, or notes about its drafting or its enforcement."

Complaint at ¶ 36; Exhibit F to Defendants' motion at page 9.

In opposition to this motion, Plaintiff argued that he had produced such documents. Exhibit J to Defendants' motion at page 3. Specifically, Plaintiff stated he had produced at least six documents regarding the confession of judgment, and attached them to his affidavit.[2] Attached hereto as Exhibit B.[3]

Defendants' motion to dismiss tries to explain this away in two ways. Both fail.

First, Defendants argue "telling the Court that Christina possesses documents did not address the contention that Plaintiff failed to produce documents or establish that Defendants' claims were deceitful." This does not address Plaintiff's instant allegation—that Defendants' represented to the court that the Plaintiff produced no such documents, when he did produce documents.

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[2] The documents produced were: letter from Plaintiff to Christina Ray, dated October 2, 1992 'to hire an attorney to get your confession of judgment filed'; letter from Christina Ray to Peter Alkalay, dated February 17, 1993, instructing Peter Alkalay to create a confession of judgment; confession of judgment dated April 13, 1993; memo from Plaintiff to Christina Ray, without date, concerning the Christina Ray's debt to Plaintiff as of July 15, 1994; letter from Christina Ray to Plaintiff, dated August 10, 1994, confirming Christina Ray's debt stated in confession of judgment; and memo from Plaintiff to Christina Ray, without date, to determine with Peter Alkalay how the confession of judgment will benefit Plaintiff.

[3] These documents are already attached collectively to Defendants Exhibit J. They are broken down here so the Court can more easily reference the subject statement, and what documents are responsive.

Second, Defendants state that "the documents thereafter identified in Plaintiff's counsel's brief and Affidavit to prove the supposed falsity of these assertions were not documents produced in discovery which addressed the 'creation' of the Confession of judgment." Defendants' Memorandum of Law at page 9.

This is inaccurate. The Defendants' alleged deceitful statement did not limit itself to only documents addressing the "creation" of the Confession of Judgment—they also claimed there were no "written communications about the confession," or "notes about its drafting or enforcement." Exhibit F to Defendants' motion at page 9.

Defendants then attempt to diminish this production, by saying that "Plaintiff's opposition identified only five documents."[4] In so doing they admit that there were five such documents produced, which is distinct from saying "conspicuously absent from Ames' [] document production are any drafts of the Confession, written communications about the Confession, or notes about its drafting or its enforcement." Exhibit F to Defendants' motion at page 9.

Finally, Defendants' argue the documents produced are not covered by Defendants' statement. Point by point, these arguments fail. First, the undated confession of judgment calculations were produced in discovery. *See* Exhibit J to Defendants' motion at page 3 ("Plaintiff's production regarding the CoJ specifically included the following"). Second, it is inarguable that a letter between Ames Ray and Christina Ray is "a written communication about the Confession," irrespective of whether it pre- or post-dates the Confession. *See* Exhibit B..

[4] There were at least six documents produced, not five. *See* Exhibit J at page 3.

Third, whatever sum was discussed in the October 2, 1992 letter, it is indisputable that this document too is a "written communication about the Confession." *Id.*

C. Plaintiff produced documents relating to the Penalty Letter

In their motion seeking spoliation, and in their brief in support of that award on appeal, the Defendants claimed, "Ames produced no documents relating to [the Penalty Letter's] creation." Complaint at ¶¶ 36, 41. *See also* Ex. F. at page 9.

In opposition to this, Plaintiff argued that they had produced such documents. Specifically, the Plaintiff stated he had produced at least three documents relating to the Penalty Letter.[5] *See also* Penalty Letter documents attached hereto as Exhibit C.

Collectively these documents were letters prior to and contemporaneous with the subject Penalty Letter, talking about what information was needed for it, and what damages would be due under it. By any reading of the word "creation", these documents relate to it.

D. There existed documents addressing the Salomon Litigation

In further support of Defendants' motion for spoliation they claimed:

> Without these files, Christina is unfairly denied evidence that could allow her to prove that the alleged sale of the House was a sham and that could be critical in cross-examining Ames and/or Alkalay. The prejudice here is especially severe because there are no documents that address these issues and plaintiff's attorney had access to the Salomon Action file while that case was ongoing.

Exhibit F to Defendants' motion at page 23.[6]

Again, Plaintiff argued that they had produced such documents. *See* Exhibit J to Defendants' motion at page 3. The Plaintiff stated that he produced at least five documents

[5] Plaintiff produced: a letter from Christina Ray to Peter Alkalay, dated February 17, 1993, confirming the Defendant shall supply Plaintiff with financial statements, the failure of which will incur damages of $50/day; a letter from Christina Ray to Plaintiff, dated September 5, 1993, the "Penalty Letter"; and a letter from Christina Ray to Plaintiff, dated September 5, 1993, enclosing the Penalty Letter, and other documents.

[6] Defendants' motion claims that the Complaint omits important text that puts this statement in context. This was done so for brevity. The unabridged statement is included here for whatever additional clarity it adds.

addressing the Salomon action.[7] *Id*. *See also* Salomon litigation documents attached hereto as Exhibit D.

Defendants mistakenly conflate two distinct concepts in their motion to dismiss, much as was done in the spoliation motion itself: the failure to place a litigation hold on a file, and not producing any document that addresses a file.

Defendants argue that the trial court recognized that the Plaintiff's counsel failed to place a litigation hold on documents relating to the Salomon action, and that the instant claim "is nothing more than Plaintiff's dissatisfaction with that ruling." Brief at 11-12.

Plaintiff' level of satisfaction with the trial court's ruling is irrelevant to the within analysis. First, as noted *supra* at page 2, the trial court's ruling was unanimously reversed. Second, and germane to this Court's analysis, the alleged deceitful statement was not that there was no litigation hold—it was that "the prejudice here is especially severe because there are no documents that address these issues." Exhibit F to Defendants' motion at page 23.

An argument that a party should be sanctioned for the failure to place a litigation hold is distinct from an argument that "there are no documents" available on a claim. On these facts, the former was supportable. The latter was not. Exhibit D.

E. Plaintiff produced documentary evidence that he made payments towards Christina Ray's credit card debts

In the underlying litigation, the Plaintiff moved to preclude Christina Ray's expert. In opposition, Defendants stated, "although Plaintiff seeks to recover monies he paid towards

[7] Specifically Plaintiff produced: an agreement between the parties, dated October 23, 1984 concerning the transfer of Plaintiff's entire right title and interest in the Sagaponack property to Christina Ray; letter of Plaintiff to Christina Ray, dated September 1, 1988, referring to construction payments of Mr. Salomon; letter of Christina Ray to Plaintiff, dated January 19, 1989, referring to Christina Ray having sole responsibility in connection with any contracts in connection with Christina Ray's Sagaponack property; an indenture agreement between the parties, dated March 12, 1990, referring to Salomon action as "her [Christina Ray's] suit against John Salomon"; letter of Christina Ray to Peter Alkalay, dated November 14, 1990, advising him that Christina Ray will make all required decisions in the Salomon action "without Ames Ray".

Christina's credit card debts, he failed to produce a shred of documentary evidence that he ever made such payments." Exhibit N to Defendants' motion, at page 5.

Also, in support of their motion for spoliation, Defendants stated, "no such files have been produced and Plaintiff's failure to preserve them denies Christina evidence that would directly bear upon whether Ames paid this credit card debt."[8] Exhibit F to Defendants' motion at page 23.

Plaintiff did produce documents supporting that he paid Christina's credit card debts.[9] *See also Ray v. Ray,* 61 A.D.3d 442 (1st Dept. 2009) ("[Christina Ray's] argument that [Ames Ray] offered no evidence that he paid these debts is unavailing, as the agreement [Christina Ray] signed expressly states that she alone accumulated these debts on specific credit cars in [Ames Ray's] name.").

Defendants' brief first argues that these were not deceitful statements because at oral argument the Plaintiff's lawyer referred to testimonial evidence that supported payment of the credit card debts, but he did not identify documentary evidence of the Plaintiff's payment of the debt. Defendants' brief next argues that the IRS disallowed the Plaintiff's attempt to claim the credit card debt as a bad debt because the IRS it unsubstantiated.

These arguments are irrelevant. The alleged deceitful statement was that the Plaintiff "failed to produce a shred of documentary evidence that he made such payments" and that "no such files have been produced." The veracity of this statement is tested by whether documents were produced—not whether at oral argument they were cited, or the IRS found them sufficient to establish bad debt.

These documents were produced and the statement is false.

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[8] Plaintiff's review of the record shows that the statement said "would," not could.

[9] Plaintiff's review of the record does not show that Defendants attached these documents to their brief. To the extent the Court converts the instant motion, Plaintiff is happy to supply it.

II. The Complaint Pleads an Action Under NYJL § 487

New York Judiciary Law § 487 reads:

> An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party…
>
> is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.[10]

Notably absent from this statute are any of the refrains that Defendants repeat in support of their motion to dismiss, such as an "extreme pattern of legal delinquency" or "misconduct that is chronic." Defendants' Memorandum of Law at page 18.

That is because the statute does not provide for it. The Second Circuit Court of Appeals acknowledged precisely this in *Amalfitano v. Rosenberg*, 533 F.3d 117, 123-124 (2008). In *Amalfitano*, the Defendant lawyer had misrepresented that the Plaintiff was a member of a partnership that owned a building, when in fact he had been removed from this role. *Id*. at 120. The Defendant lawyer also took a variety of unfounded positions during the course of the litigation, including with respect to the assertion of privilege, withholding of documents in discovery, and his characterization of certain evidence as "an atomic bomb," which actually turned out to be an unintelligible audio recording. *Id*. at 122.

In its analysis of NYJL § 487, the Second Circuit noted that "[i]t would appear that some courts in New York have imposed an additional prerequisite to discovery: that the plaintiff in a section 487 action show 'a chronic and extreme' pattern of legal delinquency by the defendant." *Id.* at 123 (citations omitted).

[10] Subsection 2 is not relevant here, and is omitted.

The Second Circuit flatly rejected this, concluding, "[t]hat requirement appears nowhere in the text of the statute, however, and other courts have found attorneys liable under the statute for a single intentionally deceitful or collusive act." *Id. citing Izko Sportswear Co. v. Flaum* 809 N.Y.S.2d 119, 122 (2d Dept. 2006); *NYAT. Operating Corp. v. Jackson, Lewis, Schnitzler & Krupman*, 741 N.Y.S.2d 385, 386 (N.Y. Sup. Ct. 2002). Provided there has been no superseding pronouncement from the Court of Appeals on the standard pursuant to NYJL § 487, this Court should give conclusive deference to the Second Circuit's finding of law. *Factors Etc., Inc. v. Pro Arts, Inc.,* 652 A.D.2d 278, 279 (2d Cir. 1981).

Subsequent to the Second Circuit's finding in *Amalfitano*, the Second Department has also explicitly rejected this patina to the straightforward requirements of the statute. *See Dupree v. Vorhees*, 102 A.D.3d 912, 913 (2d Dept. 2013) ("To the limited extent that decisions of this Court have recognized an alternative predicate for liability under Judiciary Law § 487 based upon an attorney's 'chronic, extreme pattern of legal delinquency,' they should not be followed, as the only liability standard recognized in Judiciary Law § 487 is that of an intent to deceive.").

The Fourth Department has found that either allegations of either a deceit or a chronic, extreme pattern of legal delinquency establishes a violation of NYJL § 487. *Duszynski v. Allstate Ins. Co.*, 107 A.D.3d 1448, 1449 (4^{th} Dept. 2013) ("A violation of Judiciary Law § 487 may be established by the defendant's alleged deceit *or* by an alleged chronic, extreme pattern of legal delinquency by the defendant.") (emphasis in original).

Plaintiff has pleaded—and indeed by this brief, established—that the Defendants made these eight false statements, and it is alleged they did so acting with the intent to deceive. This meets the Second Circuit's as well as the Second and Fourth Departments' standard.

The cases cited by Defendant do nothing to alter this reasoning. First, a majority of the cases Defendants cited in support of a more stringent standard pre-date the decisions in *Amalfitano*, *Dupree,* and *Duszynski*. *See Curry v. Dollard*, 52 A.D.3d 642 (2d Dept. 2008); *O'Callaghan v. Sifre*, 537 F. Supp. 594 (S.D.N.Y. 2008); *O'Brien v. Alexander*, 898 F. Supp. 162 (S.D.N.Y. 1995); *Lazich v. Vittoria & Parker*, 189 A.D.2d 753 (2d Dept. 1993); *Ticketmaster Corp. v. Lidsky*, 245 A.D.2d 142 (1st Dept. 1997); *Thomas v. Chamberlain, D'Amanda, Oppenheimer & Greenfield*, 115 A.D.2d 999 (4th Dept. 1985); *Hansen v. Werther*, 2 A.D.3d 923 (3d Dept. 2003); *Papa v. 24 Caryl Avenue Realty Co.*, 23 A.D.3d 361 (2d Dept. 2005); *Lyke v. Anderson*, 147 A.D.2d 18 (2d Dept. 1989).

Second, in *Cooke-Zweibach v. Oziel*, the judge did not dismiss the matter because there lacked "extreme egregious misconduct." 33 Misc.3d 1232[A] (N.Y. Sup. Ct. 2011). The Court instead upheld a suit pursuant to NYJL § 487 where the Defendant allegedly made a misrepresentation about his representation of a party. *Id*.

Kuruwa v. 130 E. 18 Owners Corp. provides no analysis to support dismissal of the within action because of some purported lacking "extreme pattern of legal delinquency" or "misconduct that is chronic." 121 A.D.3d 472, 472-473 (1st Dept. 2014). It superficially concludes that "the legal arguments made" do not give rise to a claim pursuant to NYJL § 487, but neither describes the statements nor discusses the "extreme pattern of legal delinquency" or "misconduct that is chronic" standards.

The balance of the holdings cited are all trial court decisions that were wrongly decided, and they should be rejected. *See Alliance Network, LLC v. Sidley Austin, LLP*, 43 Misc. 3d 848 (N.Y. Sup. Ct. 2014); *Matter of Seaman*, 2010 N.Y. Misc. LEXIS 3078 (Nassau Surr. Ct. 2010); *Burton v. Krohn (In re Swift)*, 2016 Bankr. LEXIS 262 (Bankr. E.D.N.Y. 2016). Nowhere in the statute is it stated or envisioned that there need be anything but "any deceit." Nor should there be.

Defendants caution that a plain reading of the statute would chill proper advocacy. But proper advocacy is not misrepresenting the record, time and again. And while zealousness is important to a lawyer's representation of his client, it is—and must—be tempered by their concurrent duty of candor. *See Amalfitano v. Rosenberg,* 12 N.Y.3d 8, 14 (2009) (citing "the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function.").

However, assuming *arguendo* this Court finds that the Plaintiff needed to plead an "extreme pattern of legal delinquency" or "misconduct that is chronic," it is submitted that he did.

Defendants' brief argues that each of the above statements constitutes "at the very least a reasonable interpretation of the facts and evidentiary record which were properly before the Court." No above statement does.

With respect to Defendants' citation of the trial court's statement that the Plaintiff admitted to physically abusing his wife, this is not a fact, nor is it an evidentiary record. *See supra* at pages 4-6. As importantly, this order was reversed, and is a nullity. *Ray v. Ray*, 61 A.D.3d 442, 443 (1st Dept. 2009). Further, it cannot be gainsaid that allegedly charging someone falsely with physically abusing his or her spouse is not an "extreme" statement.

As for the production of documents, as argued at length *supra*, the Plaintiff did produce documents in connection with the confession of judgment,[11] the penalty letter,[12] the Salomon litigation,[13] and the credit card debt.[14]

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[11] *Supra* page 6-8.
[12] *Supra* page 8.

Defendants' attempt to bring these statements "within the bounds of appropriate advocacy" rests upon a misreading of the above statements. They want these statements to read that the Defendants were arguing that the Plaintiff *failed to preserve* certain documents; or that the Plaintiff *lost* certain documents. And they want to conclude that the trial court's finding of the same makes the Defendants' statements true.

Neither of these attempts succeed. The Defendants stated—repeatedly, to two different courts in three different briefs—that the Plaintiff produced *no* such documents. *See* Complaint at ¶¶ 36, 38, 41, 46. The distinction between a motion for spoliation based on lost documents and one where there is no evidence available in connection with the issue was apparent to the First Department when it reversed the imposition of sanctions and held "there is other relevant documentary and testimonial evidence available to [Christina Ray]." *Ray v. Ray*, 121 A.D.3d 620, 621 (1st Dept. 2014), attached to Defendants' motion as Exhibit V.

"Summary judgment is appropriate when 'there is no genuine dispute as to any material fact.'" *Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 843 (2d Cir. 2013) *citing Celetox Corp. v. Catrett*, 477 U.S. 317, 322 (1986). At a bare minimum, there exists a question of fact for a jury to determine whether the subject statements are true despite the clear evidence contradicting them, and whether the pattern of eight deceitful statements in three briefs over twenty months is sufficiently "extreme" to warrant liability under NYJL § 487.

Finally, Defendants individually address the claims as against Julie Stark and argue that they are insufficient under Rule 8 because they do not "provide a plausible factual basis to distinguish" her conduct, and further, that her involvement was limited to arguing the opposition to Plaintiff' motion for preclusion. Defendants' Memorandum of Law at page 19.

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[13] *Supra* page 8-9.
[14] *Supra* page 9-10.

It is submitted these pleadings are sufficient. The complaint alleged that Ms. Stark was an "employee, agent, associate or principal" of the Law Office of Donald Watnick. Complaint at para. 9. The basis for this allegation can be found in Defendants' Exhibit G, which lists the appearance by Julie Stark on behalf of the Law Office of Donald Watnick. *Id* at page 1. It is further alleged upon information and belief that in this role, she contributed to the drafting of certain of the deceitful representations. Complaint at ¶¶ 28, 33, 34-39.

It may be that discovery establishes that Ms. Stark was not an "employee, agent, associate or principal" of the Law Office of Donald Watnick. It may also be that, despite her arguing a portion of the motion to preclude, she had no role in its drafting. But those two issues are subject to discovery—not dismissal.

III. Plaintiff has Sufficiently Pled Intent

Defendants argue that the Complaint failed to plead facts supporting intent because the alleged deceitful statements "had evidentiary support and fell within the bounds of appropriate advocacy" and, assuming *arguendo* that "an isolated document produced in discovery was mischaracterized or simply missed in connection with the Spoliation motion," that would be negligence, not deceit. Defendants' Memorandum of Law at page 20.

This Court should reject both arguments. First, as argued *supra* at pages 4-10, the instant matter is not appropriate advocacy, and their statements did not have evidentiary support.

Second, and more fundamentally, whether this was done through negligence or intent is not a question whose disposition is appropriate on a motion to dismiss. *See e.g. Kerman v. City of New York*, 374 F.3d 93, 116 (2d Cir. 2004) ("questions as to whether there was gross negligence, intent or reckless disregard are questions of fact to be answered by the jury.").

In this matter, it is alleged that the Defendants acted with intent in making these deceitful misrepresentations. Complaint at ¶¶ 17, 27, 28, 32, 33, 44, 45, 48-50. This intent be gleaned from Defendants' behavior. In Christina Ray's motion for spoliation, Defendants assert that the Plaintiff had produced no documents in connection with the Confession of Judgment, the Penalty Letter, or the Salomon Action. Complaint at ¶¶ 35-43. This was immediately challenged by Plaintiff's attorney, who outlined by Bates number the precise documents that were exchanged. Exhibit J to Defendant's motion at pages 2 – 5.

In Defendants' reply brief in support of their motion for spoliation, these statements were not retracted. Exhibit K to Defendants' motion. Indeed, certain of these statements were repeated in their brief on appeal. Defendants' brief on appeal attached hereto as Exhibit E;[15] *see also* Complaint at para. 41 ("In that appeal, defendant Donald Watnick made additional deceitful statements in his August 22, 2014 brief to the New York Appellate Division, First Department when he stated "Ames produced no documents relating to its [the Penalty Letter's] creation.").

Beyond that, by the time of the subject briefs the Defendants had represented Christina Ray for almost one year. In that time it must be assumed they became familiar with the file, and thus have had knowledge that each of the alleged deceitful statements made were in fact false.

The fact is that Defendants had knowledge of the falsity of their statements—and they then repeated them. That in the least is a "plausible inference" of intent. *See e.g. HSH Nordbank AG v. RBS Holdings USA, Inc.*, 2015 U.S. Dist. LEXIS 36087, * (S.D.N.Y. 2015) (J. Gardephe) (denying motion to dismiss where Plaintiff alleged Defendants "knew or had access to information suggesting that their public statements were not accurate.") *quoting ECA Local 134*

[15] Exhibit T to the Defendants' motion is Defendants' brief on appeal. It is missing pages 17-60, which contain the subject statement. The entire brief is attached here for the Court to review.

EBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 199 (2d Cir. 2009). As such, Defendants motion to dismiss should be denied.

IV. The Plaintiff Alleged Cognizable Damages

Defendants argue that the Complaint does not plead that damages were proximately caused by the subject misrepresentations. In support of this they argue that because the subject misrepresentations were not made in the initiation of a lawsuit, they are not recoverable.

This conclusion is specious. The case they cite in support—*Amalfitano*—was not only commenced on deceitful grounds, but it was also prosecuted with deceitful representations, which the Second Circuit cited, and that formed the foundation for liability. 533 F.3d 117, 122-123 (noting unsupported assertions of privilege and mischaracterizations of evidence as other reasons for finding of a violation of NYJL § 487). Other decisions have found that behavior in litigation is equally susceptible to a finding of liability under NYJL § 487. *See e.g. Chevron Corp v. Dozinger*, 871 F. Supp. 2d 229, 261-262 (S.D.N.Y. 2012) (J. Kaplan) (denying dismissal where Plaintiff claimed, *inter alia*, that Defendant lawyer fabricated evidence). Beyond that, again, this argument imports unwarranted additions into what is a very straightforward statute. *See* NYJL § 487 ("any deceit").

There is no reason to infer that the statute penalizes deceitful statements only in the initiation of a lawsuit—not during their conduct. To find so would be to neuter the statute and grant license to deceive during the course of litigation. This should be denied.

Finally, Defendants seek to dismiss two of Plaintiff's *ad damnum* requests: for injury to reputation, and for injunctive relief. They are hereby withdrawn.

V. The Within Action is Not a Collateral Attack

Defendants' final argument is that the within action must be brought in the underlying litigation, and as such it should be dismissed. Defendants cite to *Seldon v. Bernstein*, among other cases, holding that "[i]f an allegedly injured party is aware that a lawyer is violating §487 at the time the violation occurs, the victim's exclusive remedy is to bring an action in the course of that proceeding." Defendant's Memorandum of Law at page 24.

To the extent that there was support for this proposition, it is outdated. As acknowledged by the Defendants in footnote 20, the First Department in *Melcher v. Greenberg Traurig LLP* conclusively dispensed with this argument. 2016 N.Y. App. Div. LEXIS 275 (1st Dept. 2016). The Defendant in *Melcher* cited to case law arguing that a NYJL § 487 "claim brought in a separate action must be dismissed because a plaintiff's remedy lies exclusively in the underlying lawsuit itself." *Id*. at 14.

The First Department "reject[ed] this argument." *Id*. Where a party does not seek to attack the judgment in the underlying matter, and instead "seeks to recover lost time value of money and the excess legal expenses incurred," that action is permissible in a separate litigation. *Id.* at 15. The First Department stated that the language of the statute itself supported this conclusion where it says damages pursuant to NYJL § 487 may be recovered in "a civil action." *Id*.

The First Department goes on to note that the Defendants' interpretation of the statute is unworkable—"a court may not grant a motion for leave to amend a complaint to add a section 487 claim in the action in which the violation occurs, particularly if adding that claim would 'require disqualification of counsel and prejudice [the defendant's] right to be represented by attorneys of its choice.'" *Id*. at 16 *citing 360 W. 11th LLC v. ACG Credit Co. II, LLC*, 90 A.D.3d 552, 554 (1st Dept. 2011).

Indeed, prior to the First Department's decision in *Melcher*, other courts had taken a dim view of the Defendants' position that a NYJL § 487 claim must be brought in the underlying matter. Judge Kaplan in *Chevron Corp.* found this argument "deficient" based both on the plain reading of the statute, and his distinction that courts that had dismissed NYJL § 487 claims did so because they were worried about collateral attacks on the judgments in those matters. 871 F. Supp. 2d at 261-262. Where, as here, the damages are for the legal expenses, independent of the outcome, a separate action lies.

Further, in the appeal in *Amalfitano* the Second Circuit heard a matter where the NYJL § 487 claim was brought separately from the state court case wherein the allegedly deceitful statements were made. 533 F.3d 117, 121-122 (2008). The Second Circuit did not find it concerning.

In sum, there is no principled reason the within action must be brought in the underlying matter. Neither the statute nor the case law compels that outcome. Defendants' motion to dismiss on this ground should be denied.

[Intentionally left blank]

CONCLUSION

For the reasons outlined above, this Court should deny Defendants' motion to dismiss.

DATED: March 11, 2016

RESPECTFULLY SUBMITTED,

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